

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROGELIO MORENO-GARCIA,  
JASMINE RANGEL, FRANCISCO  
MORENO-MAGANA, ANTONIA  
GARCIA-MENDOZA, ISRAEL  
MORENO-GARCIA, JUVENAL  
MORENO-GARCIA, MARIO  
GUTIERREZ, AMBER HAWK,  
ALFONSO RANGEL, ANTHONY  
MAGANA, JUAN DIEGO MORENO-  
GARCIA, FRANCISCO MORENO-  
GARCIA, and LUIS BARAJAS,

NO. CV-09-3123-EFS

**ORDER GRANTING YAKIMA COUNTY  
DEFENDANTS' MOTION TO DISMISS**

Plaintiffs,

v.

YAKIMA POLICE DEPARTMENT,  
L.E.A.D. TASK FORCE OFFICERS  
JOHN and JANE DOES 1-30,  
CUSTOMS AND BORDER PATROL  
OFFICERS JOHN and JANE DOES  
1-30, YAKIMA SHERIFF'S  
DEPARTMENT OFFICERS JOHN and  
JANE DOES 1-30,

Defendants.

Before the Court, without oral argument, is Defendant Yakima Sheriff's Department Officers' Motion to Dismiss for Insufficient Service

1 of Process (ECF No. [31](#)). For the reasons set forth below, the Court  
2 grants Defendants' motion.

3 **I. Background**

4 On June 25, 2009, Plaintiff Jasmine Rangel filed a separate  
5 complaint in this Court in which she alleged that Defendants unlawfully  
6 seized personal property in connection with a drug forfeiture proceeding  
7 at four locations in Washington. Although Defendants had a warrant, Ms.  
8 Rangel alleged that they seized property not mentioned in the warrant,  
9 that she did not receive proper notice, and there is insufficient  
10 evidence to show that the articles seized were connected with drug  
11 trafficking. Ms. Rangel requested that the Court order Defendants to  
12 return the property.

13 On November 6, 2009, Plaintiffs, including Ms. Rangel, filed their  
14 Complaint in Yakima County Superior Court. (ECF No. [1](#).) On December 17,  
15 2009, Defendants removed this case from Yakima County Superior Court.  
16 Plaintiffs allege constitutional violations arising out of the seizure  
17 of the same personal property from three of the same locations.<sup>1</sup> In the  
18 facts section of the Complaint, they claim damages from injuries to their  
19 property that occurred when Defendants unlawfully broke doors to execute  
20 the warrants. (ECF No. [1](#) at 20.)

21 On July 12, 2010, the Court dismissed Plaintiffs' claims without  
22 prejudice as to Defendants Custom and Border Patrol Officers, John and  
23 Jane Does 1-30, Immigration and Custom Enforcement Officers, and Yakima

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26 <sup>1</sup> The Complaint says that Defendants seized property from four  
locations, but lists only three.

1 Police Department for insufficient service of process. (ECF Nos. 26 &  
 2 28.)

### 3 II. Discussion

4 Defendant Yakima Sheriff's Department Officers move under Federal  
 5 Rule of Civil Procedure 12(b) (5) to dismiss the Complaint because they  
 6 have not been properly served with the Summons or Complaint. Plaintiff  
 7 did not respond.<sup>2</sup> Because the Court finds that service was improper, the  
 8 Complaint is dismissed without prejudice.

#### 9 A. Standard

10 Under Federal Rule of Civil Procedure 12(b) (5), the defense of  
 11 insufficient service of process must be asserted either by answer or by  
 12 motion. If asserted by motion, Rule 12(b) states that such a motion  
 13 "must be made *before pleading* if a responsive pleading is allowed." Fed.  
 14 R. Civ. P. 12(b) (emphasis added). In this case, Defendants filed their  
 15 Rule 12(b) (5) motion to dismiss *after* asserting in their Answer (ECF Nos.  
 16 5 & 7) the defense of improper service.<sup>3</sup>

17 Courts are split as to whether a Rule 12(b) (5) motion, which is  
 18 commonly referred to as a "pre-answer" motion, is the proper procedural  
 19 vehicle for attacking service of process *after* an answer has been

21 <sup>2</sup> Failure to respond constitutes consent of an adverse order. LR  
 22 7.1(e).

23 <sup>3</sup> The Court recognizes that because Defendants asserted the defense  
 24 of insufficient service of process in their Answer, that defense was not  
 25 waived. Fed. R. Civ. P. 12(h) (1) (recognizing that a party waives the  
 26 defense of insufficient service of process if it does not assert that  
 defense in its answer or by pre-answer motion).

1 filed. Several courts have allowed post-answer motions to dismiss based  
2 on grounds asserted as defenses in the answer. See *Telesca v. Long*  
3 *Island Hous. P'ship*, 443 F. Supp. 2d 397, 405 (E.D.N.Y. 2006); *Molnlycke*  
4 *Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F. Supp. 2d 448,  
5 449 n.1 (E.D. Pa. 1999). Other courts insist that post-answer Rule 12(b)  
6 motions to dismiss are untimely. See *Augustine v. United States*, 704  
7 F.2d 1074, 1075 n.3 (9th Cir. 1983); *Byrne v. Nezhat*, 261 F.3d 1075, 1093  
8 n.35 (11th Cir. 2001).

9 Notwithstanding the "before pleading" language of Rule 12(b), the  
10 lack of other pretrial procedures for raising an improper service defense  
11 suggests that post-answer Rule 12(b) motions should be permitted. Rule  
12 12(i) requires courts to hear and decide Rule 12(b)(1)-(7) defenses  
13 before trial, whether made in pleading or by motion. Fed. R. Civ. P.  
14 12(i). But because the instant motion does not raise a so-called  
15 "nonwaivable" defense, it is not properly before the Court as a Rule  
16 12(h)(2) or 12(h)(3). See Fed. R. Civ. P. 12(h)(2) & (h)(3) (allowing  
17 parties to raise defenses subject-matter jurisdiction, failure to state  
18 a claim, or failure to join an indispensable party at any time). And  
19 because the motion does not go to the merits of the action, it is not  
20 properly brought by a motion for summary judgment. See *United States v.*  
21 *Marple Cnty. Record, Inc.*, 335 F. Supp. 95, 101 (E.D. Pa. 1971). Left  
22 with no alternative procedural approach, the Court considers the instant  
23 motion under Rule 12(b)(5).

24 In considering a Rule 12(b)(5) motion to dismiss, courts must accept  
25 as true all well-pleaded allegations in the complaint, but may reference  
26 the record to determine the alleged insufficiency of service of process.

1       5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1353 (3d. Ed.  
2       1998).

3       **B. Motion to Dismiss for Insufficient Service**

4           In order for the Court to exercise jurisdiction over a defendant,  
5       the defendant must be served properly. *Omni Capital Int'l, Ltd. v.*  
6       *Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). The plaintiff has the  
7       burden of showing that service of process was sufficient. *Wells v. City*  
8       *of Portland*, 102 F.R.D. 796, 799 (D. Or. 1984). A plaintiff serving a  
9       local government must either deliver a copy of the summons and complaint  
10      to the government's chief executive officer or accomplish service under  
11      the state's law. Fed. R. Civ. P. 4(j)(2). A plaintiff serving  
12      individuals must follow state law for serving a summons in an action  
13      brought in courts of general jurisdiction in the state where the district  
14      court is located or where service is made. *Id.* at 4(e)(1).

15           Under Washington Civil Rule (CR) 4(d)(1) and (2), the summons and  
16      complaint must be served together and in accordance with RCW 4.28.080.  
17      RCW 4.28.080 provides that a plaintiff must serve an individual defendant  
18      "personally, or by leaving a copy of the summons at the house of his or  
19      her usual abode with some person of suitable age and discretion . . ."  
20      RCW 4.28.080(15). If an individual cannot be located in this manner,  
21      service may be completed "[b]y leaving a copy at his or her usual mailing  
22      address with a person of suitable age and discretion who is a resident,  
23      proprietor, or agent thereof, and by thereafter mailing a copy by first-  
24      class mail . . ." *Id.* at (16).

25           A plaintiff must effect service within 120 days after the complaint  
26      is filed. *Id.* at 4(l), 4(m). Washington law requires a plaintiff to

1 file the complaint and then serve the summons and complaint within ninety  
 2 (90) days for purpose of tolling the statute of limitations. RCW  
 3 4.16.170. Under both federal and Washington law, a plaintiff must submit  
 4 an affidavit asserting that service was accomplished.

5 Plaintiffs' attempt at serving Defendant Yakima Sheriff's Department  
 6 Officers was insufficient. Plaintiffs attached to the end of the initial  
 7 Complaint a "Proof of Service & Declaration" signed by Daniel Marc-Roland  
 8 Cortier. (ECF No. 1 at 13.) This document indicates that a copy of the  
 9 Complaint was sent by first class mail to the Yakima Police Department,  
 10 Yakima Prosecutor's Office, L.E.A.D. Task Force in Zillah, Washington,  
 11 and United States Customs and Border Patrol and Immigration and Custom  
 12 Enforcement Offices in Washington, D.C. *Id.* Nowhere in the record is  
 13 there any evidence that Plaintiffs attempted to serve Defendants Yakima  
 14 Sheriff's Department Officers either individually or collectively.

15 Because more than ninety days have passed since Plaintiffs filed  
 16 their Complaint in Yakima County Superior Court, and more than 120 days  
 17 have passed since Plaintiffs' Complaint was removed to this Court,  
 18 Plaintiffs have failed to complete service upon Yakima Sheriff's  
 19 Department Officer Defendants. And because Plaintiffs did not timely  
 20 respond to Defendants' motions, the Court may assume they consent to  
 21 dismissal.<sup>4</sup> LR 7.1(e).

22 **III. Conclusion**

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 24 <sup>4</sup> On August 20, 2010, the Court notified Plaintiffs, as a pro se  
 25 litigants, that their "failure to file a response [would] constitute  
 26 [their] consent to the Court, granting the motion." (ECF No. 34 & 35.)

For the foregoing reasons, **IT IS HEREBY ORDERED:**

1. Yakima Sheriff's Department Officers Defendants' Motion to Dismiss for Insufficient Service of Process ([ECF No. 31](#)) is **GRANTED**. Plaintiffs' Complaint ([ECF No. 1](#)) is **DISMISSED without prejudice** as to Defendants Yakima Sheriff's Department Officers John and Jane Does 1-30.

2. **Judgment** is to be entered in favor of Defendants Yakima Sheriff's Department Officers John and Jane Does 1-30s.

3. **Within thirty (30) days of the date of this Order**, Plaintiffs shall show cause as to how the only remaining Defendant, L.E.A.D. Task Force, has properly been served. If Plaintiffs fail to do so, the Court will dismiss the L.E.A.D. Task Force Defendants, strike all hearings and pending deadlines, and close this file.

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and to distribute copies to Plaintiff and counsel.

**DATED** this 27th day of October 2010.

s/Edward F. Shea  
EDWARD F. SHEA  
United States District Judge

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